



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

JIM BRADBURY
Email: jbradbury@jw.com

JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

AUG 31 PM 3:56
CHIEF CLERKS OFFICE

817. 334.7256 (Direct Dial)
817. 870.5106 (Direct Fax)

August 31, 2007

Via Hand Delivery

LaDonna Castanuela, Chief Clerk
State of Texas Commission On Environmental Quality
12100 Park Thirty Five Circle, Building F
Austin, Texas 78753-1808

Re: TCEQ Docket No. 2007-1128-IWD; *In the Matter of the Application of Elmer Jack Parks d/b/a Jack Parks Dairy for Individual Permit No. WQ0003590000 to Operate a Concentrated Animal Feeding Operation*

Dear Ms. Castanuela:

Enclosed for filing is the original and 11 copies of *Elmer Jack Parks' Reply to Responses of Executive Director and Public Interest Counsel to Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data*. Please return the extra file-marked copies to me in the reply envelope which has been enclosed for your convenience. I have this day forwarded a copy of this document to all interested parties as indicated below.

Please contact me if you have any questions regarding this matter.

Very truly yours,


James D. Bradbury

JDB:sgm
Enclosures

4869364v.1 131466/00001

301 Commerce Street, Suite 2400 • Fort Worth, Texas 76102 • (817) 334-7200 • fax (817) 334-7290

www.jw.com • Austin • Dallas • Fort Worth • Houston • San Angelo • San Antonio • Member of GLOBALAW "

August 31, 2007

Page 2

cc: Via Hand Delivery
Mr. Robert Brush
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
12100 Park 35 Circle, Bldg. A, 3rd Floor
Austin, Texas 78753

Via Hand Delivery
Ms. Christina Mann
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
12100 Park 35 Bldg. A, 3rd Floor
Austin, Texas 78753

Via Hand Delivery
Mr. Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
12100 Park 35 Circle, Bldg. F, 4th Floor
Austin, Texas 78753

Via Hand Delivery
Mr. Charles Maguire
Mr. Chris Linendoll
Texas Commission on Environmental Quality
Land Application Team, MC-148
12100 Park 35 Circle, Bldg. F, 2nd Floor
Austin, Texas 78753

Via Hand Delivery
Ms. Bridget Bohac
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
12100 Park 35 Circle, Bldg. F, 4th Floor
Austin, Texas 78753

TCEQ DOCKET NO. 2007-1128-IWD

2007 AUG 31 PM 3:56

IN THE MATTER OF THE
APPLICATION OF ELMER JACK
PARKS D/B/A JACK PARKS DAIRY
FOR INDIVIDUAL PERMIT
NO. WQ0003590000 TO OPERATE A
CONCENTRATED ANIMAL
FEEDING OPERATION

§
§
§
§
§
§
§

BEFORE THE
CHIEF CLERKS OFFICE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

**ELMER JACK PARKS' REPLY TO RESPONSES OF EXECUTIVE DIRECTOR AND
PUBLIC INTEREST COUNSEL TO MOTION TO OVERTURN THE EXECUTIVE
DIRECTOR'S DECISION AND MOTION TO DETERMINE THE SUFFICIENCY OF
NECESSARY TECHNICAL DATA**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, Elmer Jack Parks d/b/a Jack Parks Dairy ("Parks") and files this Reply to the Responses of the Executive Director and the Public Interest Counsel to his Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data concerning his Application for an Individual Permit No. WQ0003590000 to operate a concentrated animal feeding operation ("CAFO") and in support of his Motion and this Reply respectfully shows as follows:

I. INTRODUCTION

This case concerns the Executive Director's decision to return Parks' application for a major amendment to his Individual Permit No. WQ0003590000 to operate a CAFO (the "Application") pursuant to section 281.19 of title 30 of the Texas Administrative Code on June 20, 2007. By his decision, the Executive Director forced Parks to reduce his herd size to below 200 head of cattle, with only two days notice, or risk severe enforcement penalties. The Executive Director took this action without allowing Parks the opportunity to exercise his right of having the technical sufficiency of his Application determined by the Commissioners prior to

it being returned. The facts and arguments proffered by the parties in this action are copious and varied. The decision to be made by the Commissioners, however, is simple: 1) the Executive Director made an arbitrary decision to return Parks' Application in disregard of the due process protections set forth by law; and 2) accordingly, Parks must be allowed to continue the technical review process and have his authorization to operate as a CAFO restored. As the facts and arguments set forth in Parks' Motion to Overturn and this Response demonstrate, the Executive Director's decision was erroneous and unjustified by the law and facts in this case. Accordingly, the Executive Director's decision must be overturned and Parks' Application should be reinstated for further consideration and final approval by TCEQ.

II. REPLY TO EXECUTIVE DIRECTOR AND PUBLIC INTEREST COUNSEL'S RESPONSES TO MOTION TO OVERTURN

A. TCEQ CAFO Permitting—The Problem Rests With the Process, Not the Applicant.

Throughout his response, the Executive Director repeatedly argues that the reason Parks' Application was returned and the reason Parks should be required to file a new application after three years of review is that he has repeatedly failed to furnish the required information to complete the technical review of his Application. At every turn, the Executive Director places blame with Parks as to why his Application was returned. Parks' case should not, however, be viewed in isolation but within the broader context of the Bosque River Watershed CAFO permitting process. Within that context, the actual numbers and facts of this process tell a different story than what is presented by the Executive Director.

Perhaps if Parks was among a few dairies that were floundering in the technical or administrative review process while other dairies were smoothly and efficiently working their way through the permitting process, the return of Parks' Application would not seem arbitrary or

improper. This, however, is not the case. Currently, there are approximately forty-eight permit applications for individual CAFO permits in the Bosque River Watershed pending before TCEQ. After three years, only three of the nearly fifty permit applications have completed technical review, have published their second public notice and are awaiting final hearing on their applications—*three out of nearly fifty*. Approximately, six other applicants are nearing completion of technical review, while *nearly forty* other dairies remain in the administrative or technical review process. Of the approximately fifty CAFO permit applications which were originally filed by dairies in the Bosque River Watershed, *only one permit* has been issued *after three years of review*.

These numbers tell a different story than what is depicted in the Executive Director's response. Parks is not a recalcitrant dairy that refuses to comply with the law and prevents the technical review process from moving forward. It is difficult to fathom, with nearly forty dairy CAFO permits still pending after three years of technical review, that it was only Parks (and one other dairy) whose Application merited returning, while the remaining applicants could proceed with review. If the process is moving that much more smoothly for the other dairies, it would reasonably follow that most, if not all, of the pending permit applications should be finished with technical review and their permits issued. In reality, only one fortunate dairy has completed the process and received its permit.

The Executive Director contends that it was merely out of generosity that he repeatedly extended the time for the technical review of Parks' Application and that the Executive Director could have returned Parks' Application long before he did. The reality of the situation, however, is that the Executive Director repeatedly extended the technical review period because the Executive Director needed and wanted a lengthier review process. In 2004, the Executive

Director found himself with nearly fifty applications for a type of permit that had not been issued before and for which the rules were being written as the process moved forward. The continuing dialogue between the Executive Director and the permit applicants, the constantly changing requests for information with each Notice of Deficiency (“NOD”), and the fact that nearly forty dairies are still struggling through the technical review process after three years, demonstrate that the Executive Director was not certain of how the process should work or what was required to comply with the new permitting rules. To argue that the extensions of time were merely a result of Parks’ inept responses to the Executive Director’s requests for information, therefore, inaccurately depicts the situation.

When viewed in the broader context of the CAFO permitting process generally, Parks’ situation is no different than the many other dairies working their way through technical review. It is unjust and improper, however, that Parks was randomly singled out and his authorization to operate as a CAFO revoked while the other applicants with similar circumstances maintain their CAFO authorizations in tact. The Executive Director’s decision to return Parks’ Application was arbitrary and should not stand. Accordingly, the Executive Director’s decision must be overturned and Parks’ Application must be reinstated.

B. Application of Section 281.19(b) of the Texas Administrative Code.

The Executive Director contends that Parks’ Motion should be denied because the onus was on Parks to exercise his option to have the sufficiency of the necessary technical data of his Application determined by the Commissioners rather than having it returned under section 281.19(b). The Executive Director urges that the plain reading of section 281.19(b) requires that Parks, as applicant, must ask for this referral prior to the return of his Application. (*See* Executive Director’s Response, p. 5.) According to the Executive Director, Parks missed his

opportunity to request a Commission hearing on his Application because his Application has already been returned.

The Executive Director's "plain reading" of section 281.19(b) interjects required action on behalf of the applicant where no such requirement exists. The plain meaning of section 281.19(b) provides that an applicant has the option, without question, to have his application considered by the Commissioners prior to the Executive Director returning it to the applicant. If any requirement may be gleaned from the rule, it is that the applicant's right to exercise this option is absolute, and the return of an application without providing an applicant with this option is not in accordance with the law. Consequently, when the Executive Director convened the meeting to return Parks' Application in June 2007, Parks' due process rights were triggered, and the Executive Director was obligated to comply with section 281.19(b) before returning the Application.

The Executive Director did not provide Parks with the opportunity to exercise the option under section 281.19(b), and accordingly, his decision to return Parks' Application cannot stand. In an effort to defend his action, the Executive Director argues that Parks had ample notice of the Executive Director's intention to return the Application. As evidence of notice to Parks, the Executive Director points to the statement that warned of the return of Parks' Application if an "updated technically complete and accurate" application was not timely received. This statement was repeated in each NOD. The Executive Director contends that Parks therefore could have exercised his rights under section 281.19(b) after any of the NODs. The return of Parks' Application was contrary to the continuing dialogue between the Executive Director and Parks over the three years since he filed his Application. The conversations, correspondence and ongoing conduct by the Executive Director concerning Parks' Application was such that Parks

believed the process would continue and that he was sufficiently complying with the requests for additional information. Parks cannot be expected to read the mind of the Executive Director as to when the process would end.

Further, the Executive Director contends in his response that “[i]f Parks believed...that the application was technically complete and accurate, then that was the time period available for him to request a hearing on that issue.” (Executive Director’s Response, pp. 5-6.) This statement disregards the purpose of section 281.19(b). Section 281.19(b) does not provide an option for an applicant to circumvent the technical review process. Rather, section 281.19(b) is a conduit for due process, providing an avenue by which an applicant can request a hearing on his application before the Executive Director ends the process, suddenly revokes authorization for the applicant to operate as a CAFO, and forces him to file a new application.

Parks responded to each NOD with information that he believed was accurate and complete. Parks, therefore, believed that his Application was technically complete and accurate and should proceed through technical review without further issue. As such, Parks had no reason to request a hearing by the Commissioners on his Application, and such a request would arguably have been premature and improper under section 281.19(b). The Executive Director should have provided Parks with sufficient opportunity to exercise this option prior to his Application being returned. Parks has been denied this opportunity, and consequently, the Executive Director’s decision must be overturned.

C. Sufficiency of Parks’ Application.

1. Nature of deficiencies alleged and Parks’ responses to NODs.

The Executive Director contends that Parks’ responses to the NODs were consistently insufficient and that he failed to respond to repeated requests for information. In this argument,

however the Executive Director ignores the fact that the information requested in the NODs was continually changing. While there may be some information which remains to be clarified or supplemented by Parks in his Application, much of the information that was requested in the NODs changed as time went by. Additionally, some items noted as deficiencies were requests to update information as a result of changes in rules, software or policies since Parks filed his Application in 2004 as well as questions that arose as a result of supplemental information provided by Parks.

Despite the Executive Director's arguments to the contrary, this is not a case in which an applicant ignored the Executive Director's requests for information. Parks consistently responded to requests for additional information or corrections to his Application and made a good faith effort to comply with the Executive Director's demands. The fact that the Executive Director did not approve of the format of the information supplied by Parks or did not like the answers themselves does not justify the return of his Application.

The Executive Director's response implies that Parks' case is unique in the number of NODs and the length of time required to resolve discrepancies in information and obtain proper supplementation of the Application. A brief review of TCEQ files, however, shows that dairies that have completed technical review and are awaiting issuance of their permits were faced with repeated NODs, many of them quite lengthy and requesting resolution of numerous issues. The difficulty of the ongoing process necessitated ongoing exchanges between TCEQ staff and the dairies. Park's case therefore is not the only one of its kind, and the Executive Director's decision to return his Application while continuing the review process for nearly all of the other pending applications is arbitrary, unjustified and should be overturned.

2. Parks has retained a new consultant and filing of a supplemental Application is imminent.

In reality, the return of Parks' Application seems to be indicative of a larger problem between TCEQ and Parks' former consultant, Lowther Consulting. At the time of the return of Parks' Application, Lowther represented a majority of the dairies with CAFO permit applications pending before TCEQ. With each NOD received by Parks, it was assumed that Lowther likely received similar notices for his other dairy clients and that he would continue to work with the Executive Director to resolve any questions or concerns regarding the applications. Regardless of the tensions and difficulties that may exist between the Executive Director and Lowther, these problems do not justify a return of Parks' Application, especially to the exclusion of other permit applications.

Nonetheless, since the return of his Application, Parks has retained a new consultant, Enviro-Ag Engineering, Inc. Parks' new consultant has diligently worked to remedy any and all remaining deficiencies outlined by the Executive Director concerning Parks' Application. The supplemental Application is forthcoming and should resolve the issues, if any, that currently prevent Parks' Application from completing technical review. Parks believes that upon review of this additional information, the Executive Director and the Commissioners will find his Application to be technically sufficient.

D. Return of Parks' Application was the Wrong Decision at the Wrong Time and Runs Afoul of the Underlying Purpose of TCEQ Rules.

Section 1.1 of title 30 of the Texas Administrative Code discusses the purpose behind TCEQ rules. Specifically, section 1.1 provides "[t]he rules should be interpreted to simplify procedure, avoid delay, save expense, and facilitate the administration and enforcement of state and other laws by the agency." 30 TEX. ADMIN. CODE § 1.1. The processing of Parks'

Application has failed to live up to the purposes set forth in this rule. The Executive Director's return of Parks' Application is antithetical to the tone and spirit expressed in section 1.1, because it: 1) complicates the permitting process for Parks and TCEQ; 2) it delays the issuance of Parks' permit indefinitely; 3) it requires the needless expense of starting the process over from scratch; and 4) it impedes the administration and enforcement of the new CAFO rules in the Bosque River Watershed.

In the end, one must ask *who benefits from the return of Parks' Application* and the requirement that he start the permitting process over from the beginning. Parks does not benefit because he is forced to operate as an animal feeding operation and reduce his herd size below 200 head until his individual permit is issued. The financial implications of this action are potentially catastrophic to Parks as he will suffer great financial harm to his dairy operations, risking significant loss of revenue and investments in the operations as well as possible forced closure of his dairy operations.¹ The citizens of Texas do not benefit from the Executive Director's decision because of the needless expense of taxpayer dollars which will result from litigation that will undoubtedly follow a denial of this motion as well as expenses associated with the repetition of the permitting process which Parks previously completed and the delay in implementation of the new CAFO rules in the Bosque River Watershed. TCEQ does not benefit because the Executive Director's decision further hinders its ability to process the permit applications and begin full implementation and enforcement of the new CAFO rules. Finally, the environment does not benefit from the return of Parks' Application because the issuance of

¹ To date, Parks has expended nearly \$100,000.00 since 2004 in attempting to obtain his permit and in reducing his herd size to below 200 head in response to the ED's wrongful return of his Application. Further, Parks has invested approximately \$500,000.00 into his dairy operations to bring it into compliance with environmental regulations and in modernizing his operations.

Parks' permit under the CAFO regulations is delayed, and consequently, the enforceability of the protections put in place for the Bosque River Watershed will be indefinitely postponed.

These permits need to move forward, not backward. The sluggish permitting process, with no foreseeable end in sight for approximately forty of the nearly fifty applicants, is problematic for all parties involved. Many of the dairies have been crippled by the lengthy permitting process, unable to obtain financing for their operations, expending funds to comply with the demands of TCEQ, and facing the threat of going out of business. Further, none of the new rules intended to clean up the Bosque River Watershed can be implemented until the permits are issued. Consequently, the rules remain unenforceable. Returning Parks' Application was a step in the wrong direction and serves no purpose other than to mire Parks *and* TCEQ in further red tape and litigation to try to remedy an action that was not in accordance with the law and should never have been taken. Parks Motion to Overturn the Executive Director's Decision should accordingly be granted, the Executive Director's decision be overturned, and Parks' Application be reinstated for further review and approval.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, Elmer Jack Parks d/b/a Jack Parks Dairy respectfully prays that the Commissioners overturn and vacate in its entirety the Executive Director's decision to return Parks' Application; order the Application to be reinstated and the technical review process to continue or alternatively, determine that the necessary technical data of the Application is sufficient; and award such other and further relief to which Parks may be justly entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.
301 Commerce Street, Suite 2400
Fort Worth, Texas 76102
Telephone: 817.334.7200
Telecopier: 817.334.7290

By: 

James D. Bradbury
State Bar No. 02814500
Courtney E. Cox
State Bar No. 24045711

**ATTORNEYS FOR ELMER JACK PARKS D/B/A
JACK PARKS DAIRY**

CERTIFICATE OF SERVICE

I hereby certify that on this **31st** day of **August, 2007** a true and correct copy of the above and foregoing document has been forwarded to the following parties as indicated below:

Via Hand Delivery

Mr. Robert Brush
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
12100 Park 35 Circle, Bldg. A, 3rd Floor
Austin, Texas 78753

Via Hand Delivery

Mr. Charles Maguire
Mr. Chris Linendoll
Texas Commission on Environmental Quality
Land Application Team, MC-148
12100 Park 35 Circle, Bldg. F, 2nd Floor
Austin, Texas 78753

Via Hand Delivery

Ms. Christina Mann
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
12100 Park 35 Circle, Bldg. A, 3rd Floor
Austin, Texas 78753

Via Hand Delivery

Ms. Bridget Bohac
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
12100 Park 35 Circle, Bldg. F, 4th Floor
Austin, Texas 78753

Via Hand Delivery

Mr. Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
12100 Park 35 Circle, Bldg. F, 4th Floor
Austin, Texas 78753



James D. Bradbury